No. 136. January Term, 1878.

DONOHUGH'S APPEAL.

APPEAL

From the Decree of Common Pleas, No. 2, of Philadelphia, in THE LIBRARY COMPANY OF PHILADELPHIA *vs.* WM. J. DONOHUGH.

PAPER BOOK OF APPELLANT.

J. HOWARD GENDELL,
WM. NELSON WEST,
For Appellant.

IN THE

Supreme Court of Pennsylvania,

IN AND FOR THE EASTERN DISTRICT.

Of January Term, 1878. No. 136.

Appeal of William J. Donohugh, Collector of Delinquent Taxes of the City of Philadelphia from the granting of a special injunction by the Court of Common Pleas, No. 2, of the County of Philadelphia, in the suit of the Library Company of Philadelphia *vs.* William J. Donohugh, Collector of Delinquent Taxes of the City of Philadelphia, of June Term, 1877. No. 737.

PAPER BOOK OF APPELLANT.

I. Names of Parties and Nature of the Proceedings.

These fully appear in the title of the cause.

II. Abstract of the Bill, &c.

The bill sets forth the origin and subsequent incorporation of the Library Company; the addition to its library of "a collection of books known as the Loganian Library," which it holds as a trustee under the will of James Logan, the will

of William Logan, and an agreement confirmed by an Act of the Legislature approved March 25, 1760; the association of the library with divers others named at different times, and various bequests of books; that the corporation is composed of members; the mode in which the library is maintained, and the terms and restrictions under which it may be used. The library was originally a circulating library among the members, and the profits are devoted exclusively to the expense and increase of the library. It is claimed that the corporation is one for charitable and literary uses; that it has always been exempted from taxation, and is now exempt under Art. 9, § 1, of the Constitution, and the Act of May 14, 1874, P. L., 158. The building on Fifth Street is used exclusively for the purposes of the library. It has also been declared exempt by the Board of Revision of Taxes. The Acts creating that Board and specifying their powers and duties are recited. The defendant is the Collector of Delinquent Taxes, and is about to proceed against the plaintiff. The prayers of the bill are for a declaration that the plaintiff is exempt from taxation, for an injunction, and for general relief.

No answer has yet been filed.

The affidavit of Mr. Lloyd P. Smith, on behalf of plaintiff, repeats the allegations of the bill. There is annexed to it a copy of the memorial of the Library Company to the Board of Revision of Taxes.

There is an affidavit by the defendant of the properties which, in his opinion, are to be classed as institutions of purely public charity, and, therefore, exempt. There is also a letter by the late City Solicitor to the counsel for plaintiff, and the reply to it, and a copy of the rules of the library, which, by agreement, were treated as affidavits. They show the present number of shares to be about 960, which cost

originally $40 each. The market value is less, being from $25 upwards. Transfers are subject to the approval of the directors. The annual subscription is $8, if paid promptly, producing annually $7,800. The rules of the library are also in evidence, showing the terms on which the books can be used.

III. History of the Case.

Article IX, Section 1, of the new Constitution of Pennsylvania declares: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." § 2 Avoids all other exemption laws.

The Act of May 14, 1874 (P. L. 158), passed to carry into effect this Constitutional provision, provides that "all churches, meeting-houses, or other regular places of stated worship, with the grounds thereto annexed, necessary for the occupancy and enjoyment of the same; all burial-grounds not used or held for private or corporate profit; all hospitals, universities, colleges, seminaries, academies, associations, and institutions of learning, benevolence, or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by public or private charity; and all school-houses belonging to any county, borough, or school district, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same; and all court-houses and jails, with the grounds thereto annexed, be, and the same are, hereby exempted from all and every county, city, borough,

bounty, road, school, and poor tax: *Provided*, That all property, real or personal, other than that which is in actual use and occupation for the purposes aforesaid, and from which any income or revenue is derived, shall be subject to taxation, except where exempted by law for State purposes, and nothing herein contained shall exempt same therefrom."

The plaintiff claims to be an "institution of purely public charity," within the Constitution, and an "institution of learning or charity, founded, endowed, and maintained by public or private charity," from which no income or revenue is derived, within the meaning of the Act of 1874, and that the building at the northeast corner of Fifth and Library streets is therefore exempt from taxation. This claim is disputed.

The principal facts on which the plaintiff relies are that there is no *financial* profit or dividend to the stockholders; that "any civil gentleman" has the privilege of reading the books within the building; that those not members may take books away from the building provided they pay a full consideration for their use, and give ample security for their return; this payment may be made for each book as it is taken, or it may be commuted by an annual payment; and that there are several collections of books, of which plaintiff is trustee, the use of which is free.

On the other hand, the defendant seeks to draw a distinction between a charitable *gift* and a charitable *institution*. Admitting that a gift to the Library Company may be a charitable gift, and governed by the rules regulating such gifts, he contends that the Company is not an "institution of purely public charity;" that so far as the members are concerned it is a purely financial association, by which, on the common principle of mutual co-operation, they, for a comparatively small sum, invested by each, secure an amount of literary matter far beyond the means of any one of them.

The library is a mere joint purchase for the benefit of the purchasers—the stockholders—who have paid more than the market value for the benefits which their purchase affords them. The stock has cost $40 per share, while it sells in the market for only about $25; that the hire of books for a full compensation is a mere matter of trade; that the permission given to "civil gentlemen" to read within the library rooms, while it may be a very charitable act, does not change the nature of the institution as a whole; and that the fact that the Company is trustee for other libraries, which are free, does not affect its own property. Moreover, while there is no financial profit to the stockholders, there is to the corporation.

The plaintiff also claims to be exempt by the action of the Board of Revision of Taxes. The jurisdiction of this body is denied by the defendant.

Upon affidavits, disclosing these facts, the Court below (Mitchell and Fell, JJ., Hare, P. J., not sitting) granted a special injunction, and the defendant appealed.

IV. Opinion of the Court Below.

Opinion by Mitchell, J., December 29, 1877.

This is a bill having for its special and immediate object the prevention, by means of the equitable powers of the Court, of the Collector of Delinquent Taxes from proceeding to levy and collect a sum equivalent to the legal tax rate for the year 1876, upon the library and library building of the complainants. The bill charges, and the answer admits, by failing to deny, that the Board of Revision of Taxes, in the exercise of their general jurisdiction over the subject, have declared the property exempt from taxation under the Act of May 14, 1874.

Two questions arise at the threshold of the case: 1. Has the defendant any authority to enforce the payment of taxes

upon property which the Board of Revision has declared exempt; and 2. If he has not, is his proceeding one which the Court will arrest by the exceptional remedy of injunction?

Were the payment or exemption from the tax for this single year the only, or even the main subject of dispute, it might be settled speedily and satisfactorily upon the narrow ground of the two questions already indicated. But the bill has a far wider scope in seeking an authoritative and final determination of the liability of the library and library building to taxation at all for any year, future as well as past, under existing laws.

Recognizing the importance of a speedy settlement of this question, not only to the complainant but to the public interest which he represents, the City Solicitor, as counsel for the defendant, without conceding the authority of the Board of Revision to be binding upon the Collector of Taxes, has, in a liberal and most commendable spirit, agreed to pass by the minor questions, and come at once to the real contest, as if it were before the Court, in whatever may be the proper form, for a full and final determination.

Having thus indicated that the special and subordinate points in the case are not passed by through oversight or without good reason, we proceed to the consideration of the real question, upon which a decision is desired by both parties, which is, the liability of the complainants' library, and the building in which it is kept, to taxation under existing laws.

Article IX, Section 1, of the new Constitution of Pennsylvania, declares: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public

purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity."

The Act of May 14, 1874 (P. L. 158), passed to carry into effect this constitutional provision, provides that "all churches, meeting-houses, or other regular places of stated worship, with the grounds thereto annexed necessary for the occupancy and enjoyment of the same; all burial-grounds not used or held for private or corporate profit; all hospitals, universities, colleges, seminaries, academies, associations, and institutions of learning, benevolence or charity, with the grounds thereto annexed, and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by public or private charity," together with public school-houses, court-houses, jails, &c., are hereby exempted from all and every county, city, borough, road, and school tax, with a proviso that the exemption shall not extend to property not in actual use for the purposes specified, and from which any income or revenue is derived.

This is the legislation, constitutional and statutory, by which this case must be decided. The constitution does not, of itself, exempt any property; it merely permits the Legislature to do so within certain limits. The first question, therefore, is whether the complainant's case is within the Act of 1874, and this we think so clear that it may be considered and dismissed briefly. The complainant is an "association or institution of learning." The educational influence of great libraries has been recognized by all civilized people in all ages. They have been the refuge and preservers of knowledge in the darkest times of ignorance and superstition; the source and rallying point of awakened interest in philosophy and science, wherever the human mind has aroused itself to a new search for intellectual light; and the glory and pride

of nations, in exact proportion as they have attained a higher plane of enlightened and progressive civilization. It is the concurrent and universal opinion of scholars that no single event in recorded history has been so great a misfortune to the interests of pure learning as the destruction of the Alexandrine Library.

The complainant was founded in 1731, by Benjamin Franklin, James Logan, and others, not only as an institution of learning, but undoubtedly as a charity, within the long settled and clearly defined legal meaning of that term. In 1742, it was incorporated by Letters Patent from the proprietaries of Pennsylvania, who recited in their Patent that the founders had, "at a great expense, purchased a large and valuable collection of useful books, in order to erect a library for the *advancement of knowledge and literature in the City of Philadelphia.*" This library subsequently received the accession of the library of James Logan, in its time, and for many years afterwards, the most valuable collection of books in America, and has, from time to time, been added to and endowed by gifts, bequests, and accumulations from various sources, including subscriptions and annual payments by members of the corporation. We do not think it admits of doubt that it is not only an institution of learning, but that it is also founded, endowed, and maintained by charity within the meaning of the Act of 1874.

But there remains the further and more important question, whether the Act of 1874 is constitutional. It is conceded that the Legislature cannot go outside of the class of cases in which the Constitution permits exemption from taxation, but it is to be remembered that the provision of the Constitution is not a grant of power to the Legislature, which belongs elsewhere, and is therefore to be strictly construed as in derogation of the people's right. On the contrary, it

is a restriction upon a legislative power which would otherwise be unlimited and unquestionable. It is a tying up of the legislative hand, and therefore, to be construed in a liberal spirit to remedy the mischief at which it was aimed, and not further unnecessarily to fetter the proper governmental powers of the people's representatives.

The power of a Court to set aside the legislative will is unknown, except in American jurisprudence. The authority of an Act of Parliament is supreme and unquestionable in the country from which we derive our laws and the fundamental principles of our political liberty, and in the early days of the Republic, it was not without grave doubts and serious opposition, that the judicial power was carried to this extent even here. And though it is now firmly settled that the Courts are the ultimate interpreters of the Constitution, and that all acts or legislation which are forbidden by the Constitution are to be declared void, yet it is equally well settled that this power can only be exercised where there is a clear and undoubted infringement of the Constitution. In all cases the presumption is in favor of the validity of the legislative act, and where there is room for doubt, this presumption must prevail. Especially is great respect due to the legislative construction of a constitutional provision where, as in the present case, it is a question, not of private right, but of public policy. For the preservation of individual rights, whether as between man and man, or between the citizens and the public, or the Government, the Courts are the natural guardians, with special advantages of training and modes of procedure for the attainment of justice, but for the preservation, as well as for the determination in the first instance, of matters of State policy, the proper tribunal is the Legislature; and its construction of a constitutional mandate upon this subject, must be held binding and conclusive until shown clearly and beyond all question, to be in violation

of the intention of the people in their sovereign expression of their will through the Constitution.

These principles are trite; but the haste and crudity of much recent legislation, has required such frequent exercise of the judicial power to keep it within constitutional bounds, that the delicacy and exceptional nature of the power is too commonly lost sight of, and I have thought it proper to recall its true limits, familiar as they are, because of the tone of argument for the defendant in the present case, which assumes that as exemption from taxation is a special privilege, it must be clearly shown, and that it is, therefore, sufficient for the defendant to show a doubt to defeat the complainant's case. Such certainty is the rule in determining whether or not exemption has been granted to any particular claimant by an Act of Assembly. The sovereign power of taxation is never to be taken away except by a clear grant. But where the Legistature has clearly intended the exemption, the validity of that act must be assumed like all others, until clearly shown to be beyond the legislative authority.

Bearing these principles in mind, let us proceed to the examination of the section of the Constitution upon this subject. As already said, it exempts nothing, but it authorizes the Legislature, by general laws, to exempt, speaking generally: First, public property; second, actual places of religious worship; third, burial places not for profit; and fourth, "institutions of purely public charity." The last is the only class with which we are directly concerned, though, as we shall see, some light can be had from the language used in describing the others.

Looking at this provision in the light of Lord Coke's rules for the interpretation of statutes—what was the old law, what was the mischief in it which was meant to be remedied, and what was the remedy prescribed, we can have little doubt

that this clause was intended to abolish *favoritism*, in the form of special legislative grants of exemption from taxation. The learned counsel for the complainant have collected together a list of the 130 Acts of the State Legislature, passed between 1850 and 1873, exempting private or corporate property from taxation, and they have been summarized as follows:

1. Institutions of public benevolence for the poor,	20
2. Hospitals,	16
3. Literary, scientific, and educational institutions,	19
4. Religious—churches and parsonages,	32
5. Cemeteries or burial places,	15
6. Military institutions,	6
7. Institutions of private benevolence,	13
8. Miscellaneous and doubtful,	9
Total,	130

Some of these were, at best, only private charities, and some of them, notably in the fifth class—cemeteries—were not charities at all, but mere trading corporations for private and individual profit. The large majority, however, were true charities, both in the legal and popular sense, and were worthy objects of legislative aid, but it was felt to be a hardship that that aid should be rendered as a matter of individual favoritism granted to one and withheld from another, as the views of successive Legislatures might be more or less liberal on the subject. To remedy this evil, the new Constitution provided, first and chiefly, that all exemptions from taxation should be by *general laws;* and secondly, that those laws should include only the classes of property named. Bearing in mind that institutions of public benevolence for the poor, hospitals, literary, scientific, and educational institutions, and most of the military institutions in class 6 above (being

like the Lincoln Institute and Soldiers' Orphan Schools), are all included under the general class of public charities, it is plain that, tried even by the standard of the present Constitution, the long list of exemptions in the 130 Acts referred to would still be valid, except so far as they include church property not used for public worship, cemeteries for private profit, and institutions of private benevolence. This comparison of the legislation of the last quarter of a century on the subject, with the legislation still permitted under the present Constitution, demonstrates clearly that the primary intent of this constitutional provision, as of so many others in the same instrument, was not so much to limit the scope of exemptions to charities as to destroy the obnoxious feature of favoritism by special legislation; the key-note to the whole clause is in the permission to exempt only by *general laws.*

But though this was certainly the main purpose, it is also equally clear that the provision does go a step farther, and put a limit upon the legislative power to exempt which was before unlimited. It remains, therefore, still to be considered whether the Legislature, in extending the exemption to institutions of learning such as the complainant, has transgressed the limits laid down by the words "institutions of purely public charity."

That the complainant is a charity in the legal sense of the word does not admit of question. It is equally clear that it is also a charity in the somewhat narrower and more popular sense in which we must interpret the words of a popular instrument like the Constitution. The commonest and most familiar meaning of charity is almsgiving, but that narrow definition is not the primary or most important one given in the dictionaries or sanctioned by the usage of English-speaking people. The moment the word is used in connection with the present subject matter of charitable gifts or chari-

table institutions, the popular as well as legal mind takes in at once its wider scope of good will, benevolence, desire to add to the happiness or improvement of our fellow-beings. It is in this sense that, not to mention the numerous other illustrations, our own local gifts of Elliot Cresson, for the planting of shade trees in the streets of Philadelphia (Cresson's Appeal, 6 Casey, 437), and a gift to a volunteer fire company for the protection of the property of the citizens (Thomas *vs.* Ellmaker, 1 Parsons, 98), have been recognized as charities, both in the legal and in the popular estimation.

But is the complainant a *public* charity? To answer this question we must look to the facts of the case.

By the original rules of Franklin and the other founders the librarian was required to permit "any civil gentleman to peruse the books of the library in the library-room," and in the same spirit the charter, which is the fundamental law of the corporation and the by-laws made under it, permit the use of the library: 1. By *all persons* within the library building free of charge or fee of any kind. 2. By *all persons* who desire to take out books, and for that privilege pay a small hire, and leave a deposit as security for the return of the books. 3. By members or commutors, who pay an annual sum instead of a separate hire for each time of taking out a book.

The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this *indefinite* or unrestricted quality that gives it its public character. The smallest street in the smallest village is a public highway of the Commonwealth, and none the less so because a vast majority of the citizens will certainly never derive any benefit from its use. It is enough that they may do so if they choose. So there is no charity conceivable which will not, in its practical operation, exclude

a large part of mankind, and there are few which do not do so in express terms, or by the restrictive force of the description of the persons for whose benefit they are intended. Thus, Girard College excludes, by a single word, half the public, by requiring that only *male* children shall be received; the great Pennsylvania Hospital closes its gates to all but *recent* injuries, yet no one questions that they are public charities in the widest and most exacting sense.

Tried by this standard it would seem clear that the Philadelphia Library is public so far, at least, as regards the use of the books within the building; that is free to all alike without charge. Is its public character destroyed by any special privileges to members or other individuals? We cannot see that it is. Some system of government, some regulations of administration, are necessary in all large bodies; provided they be reasonable, and not repugnant to the general purpose, they are valid and do not affect the character of the institution. The general privilege of reading the books within the building, and under the supervision of the librarian, being conceded freely to all, the further privilege is sought of taking books away to be read at home, and this we find is also conceded to all persons alike on the condition that a deposit shall be made of the value of the book to insure its return, and a sum paid for its hire or loan. A step farther brings us to the third and last privilege, that of members who instead of paying the hire of each book from time to time as they take it out, pay a single annual sum as an equivalent. The principle of commutation is familiar. It is as old as the history of tithings in England, as universal as the convenience and the necessities of business everywhere. The law prohibits a common carrier from discriminating between persons, it requires him to carry all men the same journey for the same price; yet there is probably no railroad in the country that does not issue season or mileage tickets, or

commutation in some form or other to its local customers, and this has never been held to impair or infringe upon its public character as a common carrier. Such regulations, within reasonable limits, are mere administrative details, necessary in all but the most insignificant business, and not in any way affecting the general character of the institution.

One other privilege of the members, besides this commutation of book hires, may also be included in the same class of administrative details—the privilege of voting for the managers who conduct the affairs of the Library. Some form of government is necessary. The managers are trustees, and some mode must be provided for their appointment. The particular mode selected is a matter for the founders or the State in granting a charter; but having been adopted, it does not in any way affect the public character of the corporation.

Next, and last, we have to consider the force to be given to the word "purely" in the constitutional phrase, "purely public charity." In this connection, and in its ordinary sense, the word purely means completely, entirely, unqualifiedly, and this is the meaning we must presume the people to have intended in adopting it in their Constitution. Plainly, then the charities authorized to be exempted are those that are completely and entirely public. The phrase is intended to exclude those charities which are private or only *quasi* public, such as many religious aid societies, and also those which, though public to some extent or for some purposes, have, like Masonic lodges and similar charities, some mixture of private with their public character. The true test is to be found in the objects of the institution. Are they entirely for the accomplishment of the public purpose, or have they some intermixture of private or individual gain? We get a clear and strong light on this subject from the words of the

same clause of the Constitution descriptive of burial places which may be exempted, to wit, those "not used or held *for private or corporate profit.*" Such places are unquestionably public charities, and the specification of them might have been omitted without impairing the force of the provision. But, as we have seen, the exemption of cemeteries had been recently abused by including some that were wholly for private profit, and the Constitution was made to emphasize its prohibition of such acts by specifically naming those burial places which alone might be exempted. Having done this, it passed on to name concisely and collectively all other institutions of purely public charity. The phrase might have been expressed, "places of burial and other institutions of public charity, *not for private or corporate profit.*" The language used, taken as a consistent and consecutive whole, shows that this is its plain meaning.

Is the complainant within this description?

The Library is a trust, and while it is the property of the corporation, and therefore in a certain sense of the corporate stockholders, yet it is not their property in any full legal or commercial sense. They cannot sell it and divide the proceeds among themselves as individuals—that would be a violation of the trust, which a Court of Equity would be bound at once to restrain. Being then a trust, its purpose and scope must be looked for in the grant. It is not a question of how the revenue is derived, but to what purpose and with what intent is it devoted. The purpose of this trust is clearly set forth in the charter; it is "to erect a library for the advancement of knowledge and literature in the City of Philadelphia," and we fail to discover in it any taint of private profit.

I have already discussed the members' privilege of commutation by annual payment for the hire of books, and it is

said in the charter that this payment shall be "for the increase and preservation of said library." I have endeavored to show that this privilege, almost the only one in which any distinction is made between the members and the general public, is not an undue privilege or justly obnoxious to the charge of being a private profit. But even this privilege is a regulation—not a part of the fundamental law of the corporation; and if it were held to be an undue privilege, repugnant to the public character of the charity, the result would be not that the charity would become less purely public, but that the privilege would be void.

I have not thought it necessary to notice in detail the authorities cited by the learned counsel on either side. Some of them are very close and decisive upon the points made in the case; but the subject is extensive, and this opinion has already reached a very great length, and I have therefore preferred to rest the case upon general principles, which I believe to be unquestionable.

It results from the foregoing that we hold that the complainant is exempted from taxation as an institution of learning, by the Act of May 14, 1874, and that as to such exemption the Act is within the terms of the Constitution, and is valid and binding upon the taxing power of the City of Philadelphia.

The injunction prayed for is awarded.

NOTE.—HARE, P. J., being a director of the Library Company, did not sit or take any part in this case.

V. ASSIGNMENT OF ERROR.

The Court below erred in awarding a special injunction as prayed for.

VI. Argument for Appellant.

The bill was filed for the purpose of ascertaining in an easy and expeditious manner whether the real estate of the complainant is subject to taxation. Understanding that a very important question respecting the future of the library company may depend upon the result, we have not urged the obvious objection to the forum in which the decision was asked for; and as the proposed action to which we have referred is to be permanent, and depends not so much on the comparatively trifling amount of one year's taxes as on the question of liability for the future, a decision is desired by the plaintiff on the main question, and the temporary effect of the supposed action of the Board of Revision is a matter of minor importance. In the printed brief in the Court below, the subject was dropped after the mere citation of the statutes relating to the Board of Revision. In the oral argument it was alluded to merely as the opinion of one of the departments of the City government, and as such entitled to some weight. Nevertheless, as the point is distinctly made in the bill, it is proper to submit a few words on the question.

What effect has the action of the Board of Revision?

The Acts above mentioned are those of March 14, 1865 (P. L. 320, Purdon, p. 1375, pl. 123), February 2, 1867 (P. L. 137, Purdon, 1378, pl. 137), and April 12, 1873 (P. L. 715, Purdon, 1821, pl. 4); the plaintiff's bill shows their principal provisions. We submit that these Acts show that the duties of the Board of Revision are confined to mere valuations, and have no relation whatever to questions of liability to, or exemptions from, taxation.

The original Act (Act of 1865) gives the Board "the power to revise and equalize the assessments *by raising or*

*lowering the valuation, * * * to make valuations* where they have been omitted," &c. The right to "hear all the appeals and applications of the taxpayers," clearly relates to the powers already given, and this is made still more apparent by the next clause, in which the City Commissioners are deprived of their "power to correct or revise the taxes," and are required to lay before the Board of Revision "the request of the taxpayers *to have their taxes reduced,*" and this again is followed by a clause forbidding the Board to "lower the aggregate *valuation* of the county."

The Act of 1867, § 2, gives the Board the powers of the County Commissioners in relation to the assessors and the assessment and collection of taxes, "*and the correction of all valuation* and return therefor." § 3 gives them "power to *revise and equalize* the assessments."

It will thus be seen that the duties of the Board accord fully with their name, and are confined generally to the "revision" of the work of the assessors, on whom it will not be pretended that the duty of passing upon so delicate a question as that involved in this case is imposed. The only peg upon which an argument for the complainant can be hung, is the use of the word "assessments," but the context sufficiently shows that this is used in the sense of valuations. The jurisdiction of the Courts of deciding all controversies according to the ordinary forms of law, cannot be taken away without clear and express words; it cannot be done by a loose and uncertain inference, especially where the result would be to vest it in a body of laymen whose sessions are private, who proceed without notice, and whose decisions cannot be revised by the Supreme Court.

Passing the effect of the alleged adjudication, we inquire, *Is the Plaintiff's property exempt?*

The owners of nearly $60,000,000 of property in this city claim exemption from taxation. At the tax rate of 1877, allowing nothing on the one hand for deductions for prompt payment, or on the other hand for penalties for delay, this sum should produce $1,350,000 of taxes. It is therefore manifestly of the highest importance that the Courts should adhere to the rule laid down in Academy of Fine Arts *vs.* Philadelphia County, 10 Harris, 496, that statutes which give exemption from a general burden should receive a strict construction, and that "no interests falling within the general description of taxable property can claim exemption from bearing their just proportion of the public charges, unless the exemption be so clearly expressed in the statute as to admit of no other construction. It is never to be presumed that the Legislature intend to lay unequal burdens upon the people; and their enactments are not to be construed so as to produce that result, unless the intent is so plainly expressed as to render it unavoidable."

Bearing in mind the public policy thus strongly stated, and the extreme stringency with which exempting acts have always been construed, we will adopt the rules of interpretation invoked by the Court below, and consider the old law, the mischief and the remedy.

The old law undoubtedly was that the Legislature might, in violation of the general policy, exempt what properties they pleased. No one with any practical familiarity with the details of the history of the Legislature, can doubt that this was a very great mischief, one which was recognised by every one. So generally was it recognised, that Art. 9 of the Constitution was adopted by the Convention, not only by a unanimous vote, but also without objection and without debate, and this was done although contrary to the general policy of the Convention, it repealed all exemption laws then existing, Lon-

donderry *vs.* Berger, 7 Leg. Gaz. 231. When we consider the great amount of property which is still claimed to be exempt, notwithstanding the repeal of the special exemption laws, and the substitution of a much narrower general act for the very comprehensive statutes formerly in force, it will be seen that the value of the exempt property before the adoption of the present Constitution must have been simply enormous. The natural and inevitable effect was to add materially to the public burdens imposed on others, and this inequality has long been felt to be a great hardship, and against it this article of the Constitution is especially directed, when it declares that "all taxes shall be uniform," and the Court below was, we think, in error, in asserting that the article "was intended to abolish favoritism in the form of special legislative grants of exemption from taxation;" that "the primary intent of this constitutional provision, as of so many others in the same instrument, was not so much to limit the scope of exemptions to charities as to destroy the obnoxious feature of favoritism by special legislation." The third article was framed for the express purpose of meeting that evil. The obstacles which it places in the way of special legislation are quite sufficient to check it, and if any thing more had been needed, the addition of three or four words to the long list of forbidden subjects would have accomplished the purpose. It is therefore scarcely probably that the Convention would have added an article under the inappropriate head of "Taxation and Finance" to meet a purpose so readily accomplished otherwise. It is much more likely that the main, if not the sole end in view, was to cut down the excessive number of exempt properties to a reasonable limit.

We must therefore construe this remedial provision so as to further the remedy and to reduce the exempt class as far possible. Yet we find on examination that all those affected by the general statutes, and according to the opinion of the

Court below, "the large majority" of those exempted by special laws "were true charities, both in the legal and popular sense." Indeed the learned counsel for the plaintiff who collated a list of one hundred and thirty special acts of this character passed between 1850 and 1873, stated in the Court below that less than twenty of the institutions thus exempted fall outside the legal definition of charities. It seems therefore obvious that to give the provision any substantial effect we must draw a wide distinction between institutions of charity and "institutions of *purely public* charity," and confine the latter so as to exclude a large part of the former.

The same result is reached by another course of reasoning. As already stated, the first clause of § 1 and § 2 of this article, sweep away all exemptions. Londonderry *vs.* Berger, 7 Leg. Gaz., 231. This is in accordance with the general public policy of requiring every one equally to bear his share of the public burdens. Contrary to this policy, and for the private advantage of certain property owners, there is an enabling clause permitting the Legislature to make certain exemptions. To avail himself of this private privilege the property owner must bring his property strictly within one of the classes there enumerated. There are four of them:

Public property.

And three classes of charities, viz.:

1. Actual places of religious worship.

2. Certain places of burial.

3. "Institutions of purely public charity."

The words "purely public" must have some meaning. We cannot, as the plaintiff desires, entirely reject them as

surplusage, and hold that the Legislature may exempt any charitable institution whatever. It is an established canon of construction that some meaning must be attributed to every word to which a reasonable construction can be given. The plaintiff would have us reject not only the adjective qualifying the word "charity," and the adverb intensifying the adjective, but also two whole classes of cases which his own elaborate argument, printed for the use of the Court below, shows to be charities, and therefore included in the last class. No one doubts that churches &c., are charities.

The plaintiff thus argued to prove it:

"1. Expressly mentioned in Statute of 43 Elizabeth; Earl *vs.* Wood, 8 Cushing, 437; Dexter *vs.* Gardner, 7 Allen, 245; 2 Perry on Trusts, section 701, and a cloud of other authorities."

So too it cannot be doubted that "places of burial not used or held for private or corporate profit" are charities.

The plaintiff cited to prove it:

"2. Lloyd *vs.* Lloyd, 10 Eng. Law and Eq. 139; 2 Simons (N. S.), 255; Dexter *vs.* Gardner, 7 Allen, 247; Swasey *vs.* American Bible Society, 57 Maine, 527; Willis *vs.* Brown, 2 Jurist, 987."

The absurd act of dividing the charities which may be exempted into three classes, making the third class include both the others, ought not to be attributed to the Constitutional Convention, for the purpose of producing a result which, as we have seen, should not be reached "unless the intent is so plainly expressed as to render it unavoidable."

The true distinction is suggested by the authorities cited by the plaintiff in the Court below. That is a charity whose benefits are extended to the public—if confined to the members it is not a charity. So, also, that charity is

"purely public" in which the benefits are *equally* extended to everybody, but if members, stockholders or subscribers enjoy benefits not extended to others, it is *to that extent* not public, and, therefore, taken as a whole, not purely public. This explains the threefold classification.

1. Churches, &c., some of which, although charities, extend greater privileges and advantages to their own members, pew-holders, communicants or contributors than to the people at large. Therefore, as it was thought proper to exempt them from taxation, they were separately specified.

2. Cemeteries, &c., which are principally for the advantage, although not for the "profit" of lot-holders, and are, therefore, separately named.

3. Other charities must be purely public.

The Philadelphia Library is partially for the advantage of the public at large. It may, even among the stockholders, add to and cheapen the facilities for literary culture. It may, therefore, be a charity; but as the stockholders, members, and subscribers have facilities and advantages not enjoyed by the public at large, it is, *quoad hoc*, for private advantage and profit, and its charity is not *purely* public. Not being among the classes specially named, it is not exempt.

We, in this connection, call attention to the distinction between a charitable *gift* and a charitable *institution*. The mass of cases respecting charities arise out of gifts and legacies, and have no bearing at all on the status of the recipient of the gift. In fact, every definition of a charity to which our attention has been called, relates exclusively to the gift itself. Thus, in Mr. Binney's famous argument in the Girard Will case, he defines a charity to be "*whatever is given* for the love of God," &c. Lord Camden, in Jones *vs.*

Williams, Amb., 652, describes a charity as "a *gift* to a general public use," &c. Many other authorities might be cited. But it is obvious that the recipient of charity may be anything else than charitable. The status of either a man or an institution cannot be fixed by the nature of a gift made by a third person. We may, therefore, very safely admit, as the plaintiff contends, that a gift to the Philadelphia Library may promote learning, and may, therefore, be a charitable gift. The institution itself, however, is, as to its original and principal purpose and use, intended for "the collection and use of books *by the members*, at their homes, *as a circulating library*." (See Mr. Smith's affidavit.) To secure these benefits the members have paid for each share of stock fifty per cent. more than its market value, in view of which it seems scarcely proper to consider them beneficiaries of a charity; their company is simply a co-operative association.

To this effect is Carne *vs.* Long, 2 De Gex, Fisher & Jones, 75, cited by plantiff in the Court below. "A library established for the purpose of purchasing and preserving books for the use of the subscribers," was held not to be charity at all. The plaintiff in this case is a corporation whose members are stockholders. The par value of the stock is $40. Each share is subject to the payment of an annual tax of $8. It is a close corporation; the stock cannot be transferred without the consent of the Board of Directors elected by the stockholders. To these stockholders a very important use of the library—the privilege of taking books for use without the building—is principally confined. Carne *vs.* Long, decides that as to them the institution is not a charity, "but a mere association for the mutual benefit of the contributors."

The distinction which we draw accords with the popular use of the words. The plaintiff, citing in the Court below Miller *vs.* Porter, 3 P. F. Sm., 292, informs us that a gift to

found a school is a charitable gift, and that it is "no matter that it was not to be a free school." Nevertheless the words "public schools" are used to distinguish free schools from "pay schools."

In the School District of Upper Darby *vs.* The Rector, &c., of St. Stephen's Church, Legal Int., Aug. 17, 1877 (34 Leg. Int. 291), the Common Pleas of Delaware County directly sustained our views, holding that unless the charity is purely public the institution is not exempt, and that "If its general benefits are subject to private preferences or conditions by which the general public will probably be excluded, it is not a *purely* public charity, and, therefore, not within the protection of the Act."

So, too, Academy of Fine Arts *vs.* Philadelphia County, 10 Harris, 496, already cited, is ruled upon an analogous ground. The Act of 1838 exempted *inter alia* all incorporated academies. The Academy of Fine Arts is unquestionably a charity. Cresson's Appeal, 6 Casey, 437. Nevertheless, it was held not to be exempt, although pupils were taught *gratis*, because it was for the special benefit of students of art only, and not of all students in general.

So, too, in the Morning Star Lodge No. 26, Independent Order of Odd Fellows *vs.* Hayslip, 54 Missouri, 144, a decision upon a provision like that in our own constitution, it was held that a charitable or benevolent association which extends relief only to its own sick and needy members, and to the widows and orphans of its deceased members, is not "an institution of purely public charity within the Act exempting the moneys of such institutions."

In Swift *vs.* Easton Society, 23 P. F. Sm., 362, this Court held that a beneficial society whose benefits were confined exclusively to its own members, was not a charity, inasmuch as "its benevolence begins and ends at home."

It is believed that this principle is not contested, and if the benefit of the library were confined *exclusively* to the members, no question would arise. Is the nature of the institution changed by the fact that it sells to third persons the right to use the books outside the building? By reference to the rules of the library it will be seen that full consideration is given for this privilege. In the first place, the borrower, or rather *hirer*, must give his note for double the value of the book; he must also deposit double its value; then he must pay a rate varying from fifteen cents to twenty-five cents a week. No fractions of a week are regarded, but if a book is taken just before the rooms close at five o'clock, and returned immediately after the opening, at nine o'clock next morning, full rates for a week are charged. If one volume of a series is taken, he must deposit treble its value. What charity is there in this arrangement? Is it anything more or less than a commercial transaction? What distinction is there, except in degree, between the sale of the use of a book for a week, security being given for its return, and the absolute sale of the book? If there is none, is a bookstore a charitable institution?

If we are right in making the distinction which we endeavor to draw between other charitable bodies and those which are purely public, it is obvious that the complainant is of the former class and not of the latter. At all events, if we are right in our apprehension of the principal purpose and scope of the library, the question comes down to this, Is a circulating library, an "association for the mutual benefit" of the shareholders, with a commercial feature added to it, converted into an "institution of purely public charity" by the fact that by the rules of the library the librarian is required to permit "any civil gentleman to peruse the books of the library in the library room?" This use of the books is a very incidental one, and is not at all encouraged by the offi-

cers. So far as the bill and affidavits enlighten us, it is not secured by the charter, and the rules may be changed any day. (We here speak of the Company's books, not of those belonging to the trusts.) If so subordinate a matter can change the whole character of a concern, every business house in the State will have a charitable branch connected with it. A fund provided for the free distribution of food is certainly a charitable gift. A large proportion of the saloons and taverns provide a free lunch. Are they therefore institutions of purely public charity, and as such entitled to exemption?

We called attention early in the argument to the fact that the first clause of § 1 in connection with § 2 of Art. 9 of the Constitution sweep away all exemptions already existing, Londonderry *vs.* Berger, 7 Leg. Gaz. 231. They also prohibit the Legislature from granting them anew, except so far as expressly permitted by the rest of the first section, which is enabling. This is not denied. Unless, therefore, the plaintiff's property falls within that provision, it is subject to taxation, without regard to the Act of 1874. But the Constitution itself exempts nothing. It merely enables the Legislature to act. It is therefore necessary to ascertain whether the plaintiff is within the Act of 1874, assuming that Act to be a legitimate exercise of power. The Court below thought that it was. We are not prepared to admit it. It is contended that the Library is an "institution of learning, benevolence or charity;" but this alone is insufficient; it must also be "founded, endowed, and maintained by public or private charity." Such is not the case with this Company. It is *trustee* of the Loganian Library, and of divers other collections of books, the bequests of which were doubtless charitable, but the bill and affidavits do not inform us that *its own* books and other property were thus obtained, in whole or in part. On the contrary, we know that it is a

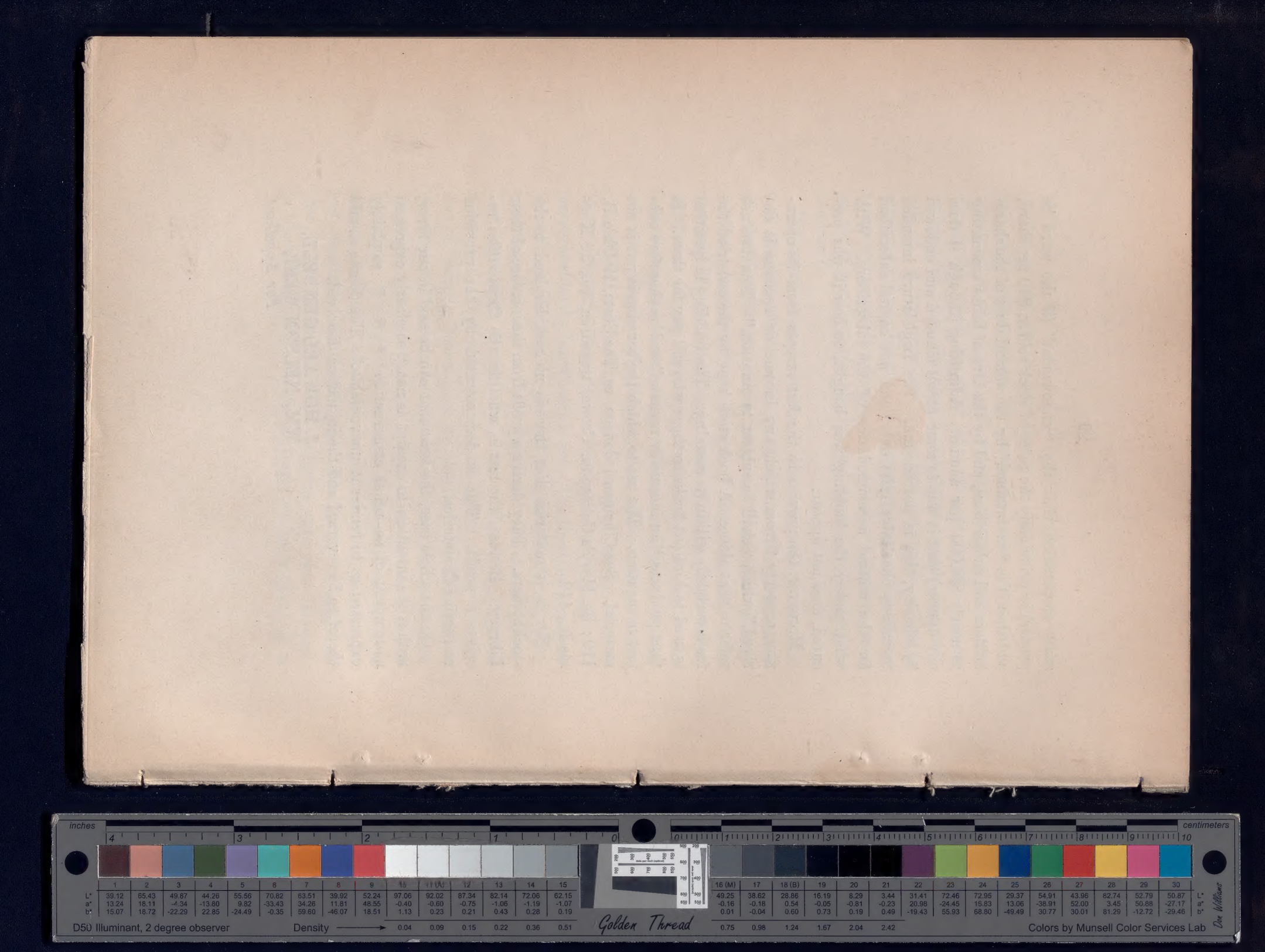
stock corporation, that the "endowment" (if the word be proper) is principally the price of stock sold at $40 per share, and that it is "maintained" by the annual dues of the shareholders and subscribers, and by the hire of books amounting to nearly $8,000 per annum. Admitting (though it does not appear) that it was *to some extent* founded and endowed by charity, this is not enough. The Legislature intended to relieve charitable gifts only, and not capital subscribed for the mutual accommodation of the subscribers. With what money the building was bought, or how it was procured, does not appear.

Moreover, the proviso to the Act excepts from its operation, property "from which any income or revenue is derived," which "shall be subject to taxation." This does not refer to rent alone. A book store kept by the owner of the fee is certainly within its meaning. The building in question is used to hire out books to those who will pay for them. It thus produces "an income or revenue" and is therefore subject to taxation. The use to which the revenue is put is not material. See Cincinnati College *vs.* The State, 19 Ohio R. 110; St. Mary's College *vs.* Crowe, treasurer, &c., 10 Kansas R., 442.

Nor is it material that there is no cash dividend to the stockholders. They derive a profit from the increase of their Library. Besides, the test is, whether the *Corporation* receives a profit. This is demonstrated by the provision respecting Cemeteries.

On the whole case, the least that can be said in our favor, is that the intention to exempt is not "so clearly expressed as to admit of no other construction * * * so plainly expressed as to render it unavoidable." The decree should therefore be reversed and the injunction dissolved.

J. HOWARD GENDELL,
WM. NELSON WEST,
For Appellant.



	1	2	3	4	5	6	7	8	9	10	11 (A)	12	13	14	15
L*	39.12	65.43	49.87	44.26	55.56	70.82	63.51	39.92	52.24	97.06	92.02	87.34	82.14	72.06	62.15
a*	13.24	18.11	-4.34	-13.80	9.82	-33.43	34.26	11.81	48.55	-0.40	-0.60	-0.75	-1.06	-1.19	-1.07
b*	15.07	18.72	-22.29	22.85	-24.49	-0.35	59.60	-46.07	18.51	1.13	0.23	0.21	0.43	0.28	0.19
										0.04	0.09	0.15	0.22	0.36	0.51

	16 (M)	17	18 (B)	19	20	21	22	23	24	25	26	27	28	29	30
L*	49.25	38.62	28.86	16.19	8.29	3.44	31.41	72.46	72.95	29.37	54.91	43.96	82.74	52.79	50.87
a*	-0.16	-0.18	0.54	-0.05	-0.81	-0.23	20.98	-24.45	15.83	13.06	-38.91	52.00	3.45	50.88	-27.17
b*	0.01	-0.04	0.60	0.73	0.19	0.49	-19.43	55.93	68.80	-49.49	30.77	30.01	81.29	-12.72	-29.46
	0.75	0.98	1.24	1.67	2.04	2.42									